

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

v.
ROBERT BARROW,

Defendants.

Case No. 2:13-cr-00185-MMD-VCF

ORDER REGARDING REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE
CAM FERENBACH

I. SUMMARY

Before the Court is the Report and Recommendation of United States Magistrate Judge Cam Ferenbach (dkt. no. 155) ("R&R") relating to Defendant Robert Barrow's ("Barrow") Motion to Suppress (dkt. no. 140). The Court has reviewed Barrow's objection (dkt. no. 156) and the government's response (dkt. no. 158). For the reasons below, the Court adopts the R&R.

II. BACKGROUND

Barrow faces ten criminal counts stemming from several robberies which took place in February, March, and April of 2013. (Dkt. no 111.) On August 6, 2015, Barrow filed a motion to suppress and requested a *Franks* hearing, arguing that Las Vegas Metropolitan Police Department ("LVMPD") officers unconstitutionally detained, searched, and interrogated Barrows, and then submitted a misleading affidavit in support

1 of a search warrant for his car. (Dkt. no. 140 at 2.) Magistrate Judge Ferenbach denied
 2 the motion in its entirety. (Dkt. no. 155.)

3 Barrow objects to Judge Ferenbach's recommendation to deny a *Franks* hearing
 4 to challenge the search warrant issued for Barrow's car. (Dkt. no. 156 at 1.) He argues
 5 that Judge Ferenbach erred in finding the affidavit in support of the warrant was
 6 sufficient even when several alleged omissions were considered. The Court disagrees
 7 and adopts Judge Ferenbach's R&R.

8 **III. LEGAL STANDARD**

9 Magistrate judges have authority to review and file findings and recommendations
 10 on matters referred by the district court, including motions to suppress evidence in a
 11 criminal case. LR IB 1-4(h). This Court "may accept, reject, or modify, in whole or in part,
 12 the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).
 13 Where a party timely objects to a magistrate judge's report and recommendation, then
 14 the court is required to "make a *de novo* determination of those portions of the [report
 15 and recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). The Court thus
 16 accepts the portions of the R&R to which Barrow does not object and conducts a *de
 17 novo* review of the portion of the R&R to which Barrow objects—the Magistrate Judge's
 18 recommendation to deny a *Franks* hearing.

19 In *Franks v. Delaware*, 438 U.S 154 (1978), the Supreme Court established a
 20 two-prong test for overturning a judicial officer's probable cause finding. First, there is
 21 a "presumption of validity with respect to the affidavit supporting the search warrant." *Id.*
 22 at 171. Second, a defendant is entitled to an evidentiary hearing on the validity of the
 23 affidavit only if he can make a "substantial showing" that: (1) the affidavit contains
 24 intentionally or recklessly false statements or misleading omissions and (2) the affidavit
 25 cannot support a finding of probable cause without the false information or with the
 26 misleading omissions. *Id.* at 155–56.

27 The Ninth Circuit has articulated five requirements that a defendant must satisfy
 28 to warrant a *Franks* hearing: (1) the defendant must allege specifically which portions of

1 the warrant affidavit are claimed to be false; (2) the defendant must contend that the
 2 false statements or omissions were deliberately or recklessly made; (3) a detailed offer
 3 of proof, including affidavits, must accompany the allegations; (4) the veracity of only the
 4 affiant must be challenged; (5) the challenged statements must be necessary to find
 5 probable cause. *United States v. Perdomo*, 800 F.2d 916, 920 (9th Cir. 1986) (citing
 6 *United States v. Dicesare*, 765 F.2d 890, 895 (9th Cir. 1985)). In other words, a
 7 defendant must show that the affidavit could not support a finding of probable cause
 8 even if it were purged of its falsities and supplemented by the omissions. See *United*
 9 *States v. Stanert*, 762 F.2d 775, 778 (9th Cir. 1985) (citing *Franks*, 438 U.S at 171-72).

10 A judge's probable cause determination is accorded "significant deference,"
 11 *United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995), and will be overturned only if it
 12 is "clearly erroneous." *Stanert*, 762 F.2d at 778. In making this determination, the court is
 13 "limited to the information and circumstances contained within the four corners of the
 14 underlying affidavit." *Id.* The duty of a reviewing court is to ensure that the magistrate
 15 judge had a "substantial basis" for concluding that probable cause existed. *Illinois v.*
 16 *Gates*, 462 U.S. 213, 238 (1983) (internal quotations omitted).

17 **IV. DISCUSSION**

18 In support of his request for a *Franks* hearing, Barrow identifies eleven facts that
 19 were omitted from LVMPD's application and affidavit for a search warrant. (Dkt. no. 140
 20 at 17-18.) The facts range from a negative eyewitness identification, to details about
 21 Barrow's first contact with police, to allegations about what police officers knew and
 22 when. (*Id.*) Judge Ferenbach characterized these omissions as "conjectural, irrelevant,
 23 or legal conclusions." (Dkt. no. 155 at 7.) He then concluded that probable cause for a
 24 search of Barrow's vehicle existed even when these omissions were considered. (*Id.*)

25 The application and affidavit for a search warrant contain facts that support a
 26 probable cause finding even taking all of Barrow's alleged omissions into account. For
 27 example, as Judge Ferenbach notes in the R&R, Barrow asked a friend to remove a
 28 jacket and backpack from the vehicle in question during a recorded phone call while he

1 was in custody. (Dkt. no 140-8 at 25.) In a later phone call, Barrow expressed
2 displeasure that the police had impounded his vehicle before his friend could retrieve the
3 items. (*Id.* at 26.) These statements clearly tie the vehicle to Barrow, who at the time he
4 made the calls had been arrested and charged with robbery. (*Id.* at 24.) The alleged
5 omissions and misleading statements that Barrow relies upon do nothing to undermine
6 these facts, and therefore he has not satisfied the second *Franks* factor — showing that
7 the affidavit cannot support a finding of probable cause without the false information or
8 with the misleading omissions. The Court thus agrees with the Magistrate Judge's
9 finding.

10 **V. CONCLUSION**

11 It is therefore ordered, adjudged and decreed that the Report and
12 Recommendation of Magistrate Judge Cam Ferenbach (dkt. no. 155) be accepted and
13 adopted in full. Defendant's Motion to Suppress and *Franks* Hearing Request (dkt. no.
14 140) is denied.

15 DATED THIS 8th day of December 2015.

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18 MIRANDA M. DU
19 UNITED STATES DISTRICT JUDGE
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